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SUPREME COURT, U.S.

No. 97-1891

In The

Supreme Court of the United States

October Term, 1997

JAMIE BABICZ, JENNIFER BABICZ, BY AND THROUGH THEIR PARENTS AND FRIENDS, JEROME BABICZ AND JOYCE BABICZ, JEROME BABICZ, INDIVIDUALLY, JOYCE BABICZ, INDIVIDUALLY,

Petitioners,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, FRANK PETRUZIELO, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE BROWARD COUNTY PUBLIC SCHOOLS, DANIEL O'KEEFE, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF RAMBLEWOOD MIDDLE SCHOOL, A BROWARD COUNTY PUBLIC SCHOOL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Respondents in their "Brief in Opposition to Petition for Writ of Certiorari" raise two new points. First, Respondents assert that "this Court has no jurisdiction over the claims because the claims are moot" and because "there is no controversy between the parties." (Respondents' Brief at 3-4). Respondents' mootness argument misstates the law in two distinct and basic respects. First, their assertion is surprising because, as Respondents acknowledge, one of the forms of relief Petitioners seek is compensatory damages for violations of Title II of the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. This Court has stated on numerous occasions that a case is not moot when there is a viable claim for damages. *City of Richmond v. J.A. Crosson Company*, 488 U.S. 469, 478 (1989); *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8-9 (1978); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Respondents' claim of mootness is based on their assertion that Petitioners no longer attend Ramblewood Middle School and that the original 504 plans in dispute are no longer in effect.[1] (Respondents' Brief at 3-4). Respondents give no indication of how this fact can possibly moot Petitioners' claims for compensatory damages. In support of their mootness

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[1] Respondents' Brief in Opposition makes several references to facts which are not contained in the record, including the present school placement of the minor petitioners. Petitioners do not dispute that they now attend Taravella High School.

claim Respondents cite two sources, neither of which supports their contention that this case is moot. First, in their Brief at page 3, Respondents cite *Allen v. Wright*, 468 U.S. 737 (1984), for the general proposition that "[t]he basis of the mootness doctrine is to ensure that the courts review only those claims that present live disputes." However, the *Wright* case involved standing and its only reference to mootness is in a listing of issues that come under the heading of justiciability. *Id.* at 750.

Respondents also quote from the first sentence to § 3533.3 of 13A Charles Alan Wright *et al.*, Federal Practice and Procedure page 261 (2d ed. 1984) on the general definition of mootness. Respondents, however, fail to mention that on the next page Professor Wright states, "Claims for damages or other monetary relief automatically avoid mootness, so long as the claims remain viable. Damages should be denied on the merits, not on the grounds of mootness." Consequently, Professor Wright and the authority he cites support Petitioners' claim that this case is not moot.

Respondents' mootness argument fails for a second reason. Because minor Petitioners are no longer in middle school but are now attending a high school operated by Respondent Broward County School Board, the appropriateness of accommodations afforded them as a result of their disabilities may arise again and thus falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. In *Western v. Bradford*, 423 U.S. 147, 149 (1975) (per curium), this Court said "in the absence of a class action, the 'capable of repetition, yet evading review' doctrine [is] limited to the situation where two elements combined: (1) the challenged action

was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Both elements of the test are met here. Furthermore, this Court has recognized the applicability of the "capable of repetition, yet evading review" exception to education cases in *Honig v. Doe*, 484 U.S. 305, 317-323 (1988) and *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 186 (1982).

Respondents' discussion of *Hope v. Cortines*, 872 F.2d 14 (E.D. N.Y. 1995) appears to raise a second new point. If Respondents mean to say that any service or accommodation afforded a student with a disability constitutes special education, then Respondents are asking this Court to disregard the distinction between "special education" and "related services" set forth in the IDEA, 20 U.S.C. §§ 1401(12), (15), and (16) and restated in *Irving Independent School District v. Tatro*, 486 U.S. 883 (1984). The effect of Respondents' Argument is to make the ADA and § 504 inapplicable to school children.

Dated: July 21, 1998

Respectfully submitted,

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